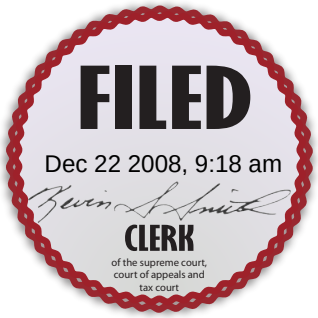

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IN THE
COURT OF APPEALS OF INDIANA

DAYMON HOLBERT,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 49A04-0802-CR-106
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Tanya Walton Pratt, Judge
Cause No. 49G01-0601-MR-10054

December 22, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Daymon Holbert was convicted of murder[1] and robbery[2] as a Class B felony after a jury trial and was sentenced to sixty years and twenty years respectively, which were to run concurrently. He appeals, raising the following restated issue: whether the trial court abused its discretion when it allowed a witness to testify as to what she was told by Holbert's co-defendant regarding a statement made by the victim just after she had been shot.

We affirm.

FACTS AND PROCEDURAL HISTORY

LaShawn Campbell was a drug dealer and was often in possession of both drugs and large amounts of money. On June 18, 2004, Holbert, who was known by the nickname "D," met with Campbell in a parking lot, and the two completed a drug transaction. *Tr*. at 536, 720. Prior to this meeting, Holbert had told some people that he did not have any money and was looking "for a lick," which meant he was looking for someone to rob. *Id*. at 532, 727. Around the date of this drug transaction, Holbert frequently spent time with Jacque Johnson. On June 20, 2004, Holbert and Johnson had a conversation in the apartment of Dana Foley, Johnson's girlfriend, regarding a potential robbery. Holbert suggested that they rob a nearby gas station, but Johnson rejected the idea because he was worried about the cameras and layout of the gas station.

The next morning, on June 21, Holbert came over to Foley's apartment, and Johnson left with him. Johnson returned approximately twenty minutes later. Shortly thereafter,

[1] *See* Ind. Code § 35-42-1-1.

[2] *See* Ind. Code § 35-42-5-1.

Holbert came back and told Johnson to "hurry up" because "it was time and they had to go." *Id*. at 735. Johnson again left Foley's apartment with Holbert. Johnson and Holbert then met Campbell in a nearby parking lot. Johnson entered Campbell's car and sat in the backseat. He asked Campbell, "Is this good shit?" referring to the drugs Campbell was selling. *Id*. at 747. Johnson then shot Campbell six times in the back.

Johnson and Holbert returned to Foley's apartment, and Foley noticed that Johnson looked scared, "like he had saw [sic] a ghost." *Id*. at 737. When Foley asked him what was wrong, Johnson just shook his head. Holbert then told Johnson that "he did fine," and reassured him, saying "don't worry about it." *Id*. at 737-38. Johnson went to the closet and placed something in a brown paper bag in the top of the closet. Holbert advised Johnson to "hurry up, they had to go," and the two men left Foley's apartment. *Id*. at 738. Later that evening, Johnson told Foley about shooting Campbell. He told Foley that, after Campbell was shot, she looked at Holbert and said, "Why, D, why." *Id*. at 751. Foley later looked in the bag Johnson had placed in the closet and saw that it contained the gun Johnson usually carried on his person. The next day, Foley observed Johnson in possession of a large amount of crack.

Foley eventually made a statement to the police implicating Holbert and Johnson in Campbell's murder. The State charged Holbert with murder and robbery as a Class A felony. At the jury trial, Foley testified about her conversation with Johnson after the shooting, including Johnson's statement regarding Campbell's last words. Over the objection of Holbert, the trial court concluded that the testimony was admissible under Indiana Evidence

Rule 801(d)(2)(E). The jury convicted Holbert of murder and robbery as a Class A felony. At sentencing, the trial court reduced the robbery conviction to a Class B felony and sentenced Holbert to sixty years for the murder conviction and twenty years for the robbery conviction with the sentences to run concurrently. Holbert now appeals.

DISCUSSION AND DECISION

The admission of evidence is within the sound discretion of the trial court. *Cox v. State*, 774 N.E.2d 1025, 1026 (Ind. Ct. App. 2002). We will not reverse the trial court's decision to admit evidence absent an abuse of discretion. *Boney v. State*, 880 N.E.2d 279, 289 (Ind. Ct. App. 2008), *trans. denied*. An abuse of discretion occurs if the trial court's decision is against the logic and effect of the facts and circumstances before the court. *Id.*

Holbert argues that the trial court abused its discretion in allowing Foley to testify regarding what Johnson told her as to Campbell's last words after she was shot. Holbert contends that the statement was hearsay and was not admissible as a statement by a co-conspirator during the course and in furtherance of the conspiracy under Evidence Rule 801(d)(2)(E). He claims that, although the statement by Campbell was an excited utterance, the State did not prove that the statement by Johnson to Foley was made during the course and in furtherance of the conspiracy because it was made after the robbery and murder occurred. Holbert also argues that the admission of this evidence was not harmless error because this statement placed him at the crime scene, and he consistently denied being involved in the crime.

Hearsay is "a statement, other than one made by the declarant while testifying at the

trial or hearing, offered in evidence to prove the truth of the matter asserted." Ind. Evidence Rule 801(c). Hearsay is generally inadmissible. Evid. R. 802. However, "a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy" is not considered hearsay. Evid. R. 801(d)(2)(E). Further, "a statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition" is admissible because it falls under the excited utterance exception to the hearsay rule. Evid. R. 803(2).

In the present case, the State sought to admit Foley's testimony regarding what Johnson told her that Campbell said after she had been shot. Because Foley's statement contains hearsay (Campbell's statement) within hearsay (Johnson's statement), each layer of hearsay must qualify under an exception to the hearsay rule before the statement at issue may be admitted into evidence. *Mayberry v. State*, 670 N.E.2d 1262, 1267 (Ind. 1996) (citing Evid. R. 805). Campbell's statement of "Why, D, why?", the first layer of hearsay, was an excited utterance as her statement was made relating to the startling event of being shot and was made while Campbell was under the stress of the excitement of being shot. *See Appellant's Br.* at 15-16; Evid. R. 803(2). Holbert concedes as much and agrees that Campbell's statement was properly admitted under this hearsay exception.

At trial, the trial court allowed Johnson's statement as to what Campbell said, the second layer of hearsay, to be admitted under Evidence Rule 801(d)(2)(E) as a statement of a co-conspirator during the course and in furtherance of the conspiracy. For a statement to be admissible under this rule, the State must prove that there was independent evidence of the

conspiracy. *Roush v. State*, 875 N.E.2d 801, 808 (Ind. Ct. App. 2007). Therefore, "the State must show, by a preponderance of the evidence, (1) the existence of a conspiracy between the declarant and the party against whom the statement is offered and (2) that the statement was made in the course and in furtherance of the conspiracy." *Id*. (citing *Barber v. State*, 715 N.E.2d 848, 852 (Ind. 1999) (citing *Wright v. State*, 690 N.E.2d 1098, 1105 (Ind. 1997))).

Before Johnson's statement to Foley could be considered admissible, the State had to establish that a conspiracy between Holbert and Johnson existed. The existence of a conspiracy may be proven "by direct or circumstantial evidence" and the proof "need not be strong." *Robinson v. State*, 730 N.E.2d 185, 193 (Ind. Ct. App. 2000), *trans. denied*. The evidence at trial showed that, prior to the crime at issue, Holbert stated on at least two occasions that he was looking for someone to rob. The day before this crime, Holbert and Johnson discussed committing a potential robbery, and the two even discussed a possible target, which was ultimately rejected. Evidence was also presented that Holbert had purchased drugs from Campbell three days before she was killed and that he had her cell phone number and was therefore able to contact her to set up another meeting. Holbert and Johnson left Foley's apartment together around the time of the shooting. Further, when Holbert and Johnson returned to Foley's apartment on the day of the crime, Johnson placed a paper bag containing a gun in the closet. Holbert's statements telling Johnson "he did fine" and not to worry indicated that he was aware that Johnson had shot Campbell, and his statement to Johnson to "hurry up, they had to go," along with the fact that they left together, supported an inference that they were acting in concert in fleeing the scene. *Tr*. at 737-38.

The State presented enough evidence for the trial court to conclude, by a preponderance of the evidence that a conspiracy existed between Holbert and Johnson.

The State next had to prove that Johnson's statement to Foley was made in the course and in furtherance of the conspiracy between him and Holbert. "A statement is made in the course of a conspiracy when it is 'made between the beginning and ending of the conspiracy.'" *Roush*, 875 N.E.2d at 809. "[A] statement is in furtherance of a conspiracy when the statement is 'designed to promote or facilitate achievement of the goals of the ongoing conspiracy[;] [m]ere "idle chatter" does not satisfy the in-furtherance requirement.'" *Id*.

Here, the statement by Johnson to Foley occurred after the robbery and murder of Campbell had been completed. At the time that Johnson made this statement to Foley, it was several hours after the crime occurred, and he was merely recounting to her what had transpired in response to Foley's question about what had happened that afternoon. The State did not demonstrate how Johnson's statement was designed to promote or facilitate the achievement of the goals of the conspiracy. It was not shown that Johnson was trying to conceal the crime or further the conspiracy in any way in making the statement to Foley. Instead, the State merely showed that Johnson was engaging in a conversation with his girlfriend when he made the statement. Because the State failed to meet the requirements of Evidence Rule 801(d)(2)(E) with respect to Foley's testimony about her conversation with Johnson, the trial court abused its discretion in allowing Foley to testify as to Johnson's statement that Campbell stated, "Why, D why?" after being shot.

However, we will not overturn Holbert's conviction if the erroneous admission of evidence was harmless. *Lander v. State*, 762 N.E.2d 1208, 1213 (Ind. 2002) (citing Ind. Trial Rule 61). An error in the admission of evidence is harmless error if it does not affect the substantial rights of a party. *Id*. (citing *Fleener v State*, 656 N.E.2d 1140, 1141 (Ind. 1995)). After reviewing the record in this case, we conclude that the error in the admission of the evidence was harmless. The evidence showed that Holbert had talked about his desire to commit a robbery prior to the commission of the present crime, he had previously purchased drugs from Campbell and had her cell phone number, he left with Johnson prior to the crime, and he returned with Johnson after the crime had been committed. Additionally, when he and Johnson returned to the apartment, Holbert stated to Johnson that "he did fine," and reassured Johnson, saying "don't worry about it." *Id*. at 737-38. Therefore, the evidence showed that Holbert was the person who suggested the commission of a robbery and who previously knew the victim and how to contact her and that he left with Johnson, the shooter, and returned with him to the apartment later. Because other evidence established that Holbert was involved in the commission of the crime, we believe that the admission of the testimony was harmless.

Affirmed.

VAIDIK, J., and CRONE, J., concur.